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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 774

TIME, INC.,
Petitioner,

vs.

GEORGE W. HARTMANN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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April 29, 1948.

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TIME, INC., *Petitioner,* *vs.* GEORGE W. HARTMANN, *Respondent.*	No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioner, Time, Inc., a New York corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review an order and judgment of that Court, entered September 23, 1947 (R. 104),[1] as amended by its order entered February 3, 1948 (R. 165), and from the amended judgment of that Court, entered February 3, 1948 (R. 165), vacating a judgment of the United States District Court for the Eastern District of Pennsylvania, entered February 15, 1946, in favor of petitioner (R. 50.) Your petitioner

[1]Record references are in parenthesis and refer to numbers appearing at bottom of the record pages.

seasonably filed with the Circuit Court of Appeals its petition for rehearing and modification of the order and judgment of September 23, 1947 (R. 105). The petition was denied by order entered February 3, 1948 (R. 144). A certified transcript of the record is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

PRELIMINARY STATEMENT

The effect of the decision below is to require a trial in the United States District Court which will be of gargantuan proportions, in that the District Court is in effect directed to review the substantive law of libel of every state and nation in the world.

This is because the complaint is for an alleged libel in the well-known magazine "Life", which has a world-wide circulation,[2] and the complaint has been construed by the Court below as alleging causes of action in respect of publication in all the jurisdictions of the world in which "Life" circulates.

The opinion below constitutes, therefore, a most dangerous precedent, for whatever be the disposition in this particular case in the District Court, the opinion below will stand, unless corrected now by this Court, as authority for the proposition that in actions against publications with nationwide or world-wide circulation, or indeed with any circulation outside the place of "first publication",[3] it will be the

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[2]On this record, of more than 3,900,000 copies (R. 20); actually, now even greater.

[3]We follow the opinion of the Court below in using the shorthand phrase "first publication" to cover what a layman would in all probability simply call "publication" as distinguished from subsequent "circulation".

privilege of the plaintiff and the duty of the District Court to consider the laws of every jurisdiction in which the magazine circulates. This result is the more extraordinary when it is observed that the Court below correctly held that it was the law both of Pennsylvania, in which the District Court was sitting, and of Illinois, in which "Life" was first printed and published, that the tort of libel occurs only in such jurisdiction of "first publication". But the Court below then turned around and said that Pennsylvania would, as a matter of conflict of laws, apply the substantive law of any other state or nation which follows a different rule that there is a new actionable libel in every additional jurisdiction in which the magazine circulates. We believe that in so doing the Court below misconstrued the Pennsylvania law.

We are frankly in the position of asking this Court to make that unusual exercise of its discretion in which it reviews a decision of a Circuit Court of Appeals, notwithstanding that it is not a final judgment, because the opinion of the Circuit Court of Appeals would otherwise stand as a precedent for a proposition so awkward for judicial administration and presumptively so erroneous that it should be corrected, or at the very least reviewed, by this Court.

That there is no jurisdictional bar to this Court's granting such relief, is settled. *Gay* v. *Ruff*, 292 U. S. 25, 28-31. *United States* v. *Gulf Refining Co.*, 268 U. S. 542, 544-545. *Forsyth* v. *Hammond*, 166 U. S. 506, 511-515. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384-385. And it is respectfully submitted that (i) where there are authoritative decisions by the State courts and (ii) a Federal District Court properly construes and applies the appropriate State law and (iii) where, on

appeal, the Circuit Court of Appeals, in reversing, improperly construes, misapplies and distorts important rules of local law, this Court should review the decision of the Circuit Court of Appeals. *E.g., American Seating Company* v. *Zell,* 322 U. S. 709. *Fidelity Trust Co.* v. *Field,* 311 U. S. 169, 177-178. *Meredith* v. *Winter Haven,* 320 U. S. 228, 237. *Stoner* v. *New York Life Insurance Co.,* 311 U. S. 464. *Cf. Six Companies* v. *Joint Highway District,* 311 U. S. 180, 188. *Wichita Royalty Co.* v. *City National Bank of Wichita Falls,* 306 U. S. 103, 110.

STATEMENT OF FACTS

On and prior to January 10, 1944, "Life" magazine printed in Chicago (a) plates of its issue bearing date of January 17, and (b) final copies for distribution in Illinois and elsewhere other than certain Eastern states. On January 10 that distribution commenced in Chicago. On the same day, a set of the plates having in accordance with customary practice been forwarded by air to Philadelphia, a second printing took place there, and distribution commenced in Philadelphia on January 11. By January 14 distribution was completed to all newsstands and subscribers except those in remote portions of the United States and in foreign countries (R. 11-21).

The issue contained an alleged libel on Hartmann, a Professor at Columbia University, in that it imputed Fascist leanings to himself and to the organization known as "Peace Now" of which he was chairman and guiding spirit.

The issue of February 7, 1944, of "Life" contained a letter of protest by Hartmann and a reaffirmation by the editors that they believed that they had dealt fairly with Hartmann and with the movement of which he was a leader,

and that they believed that his movement was dangerous to our war effort and to our attempts to achieve a worth while peace.

Hartmann brought a number of actions with substantially similar complaints. These included an action in the District of Columbia commenced on January 17, 1945 (R. 80-81), in the New York Supreme Court on January 15 (R. 62), and in the Massachusetts Superior Court on January 15, as well as the present action in the Philadelphia Common Pleas Court on January 17 (R. 9). The Philadelphia action was later removed to the United States District Court. In each of the actions Hartmann unsuccessfully sought, by amendment or by a second count, to plead the issue of "Life" of February 7 as an independent cause of action. In the instant action, motion to amend complaint was filed on May 17, 1945 (R. 46), and was denied because not timely made (R. 50).

The petitioner met all of these actions by motions for dismissal based on the respective statutes of limitations. All were dismissed on that ground.[4] The judgment of the New York Supreme Court was affirmed by the Appellate Division and leave to appeal to the New York Court of Appeals was denied. Appeal from the judgment of the District Court for the District of Columbia was dismissed for lack of prosecution. In Massachusetts, the dismissal was both on the statute of limitations and on the ground of *res judicata*. Appeal therefrom was dismissed for lack of prosecution.

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[4]Decisions in the actions referred to are located as follows: *District of Columbia*: R. 84-85; unreported. *New York*: R. 62-65, 76-79; 60 N. Y. S. 2d 209, aff'd 271 App. Div. 781, appeal denied 271 App. Div. 826. *Massachusetts*: Original exhibits filed with the Clerk of this Court; unreported.

In the present case the same result was reached in the District Court. See the extensive opinion of Kalodner, J. at R. 42-49, and judgment at R. 49.

The appeal was argued before Biggs and McLaughlin, Circuit Judges, and Rodney, District Judge, on November 7, 1946, and the opinion of Judge Biggs for the Court was filed on September 23, 1947. Petition for rehearing was filed October 20, 1947, and the result was an extensive amendment, filed February 3, 1948, to that part of the opinion which dealt with *res judicata*. But the Court adhered to its order of reversal and remand. Hence this petition.

Analysis of the Opinion Below

As might be expected from the length of time that the case was *sub judice* in the Third Circuit Court of Appeals, Judge Biggs delivered an extensive and scholarly opinion. That is precisely the difficulty. As the opinion reflects extensive study, it will stand all the more strongly as a precedent, unless corrected. The opinion decided substantially all contested points in favor of the petitioner, specifically:

That under the substantive law both of Pennsylvania and of Illinois, the rule, which Judge Biggs designated as the "single publication" rule, applies (R. 152, 153);

That the "single publication" rule is indeed the preferable one and is recommended both by logic and by public policy (R. 153);

That such "first publication" unquestionably took place in fact prior to January 17, 1944 (R. 152, 154, 155);

That the contents of the issue of February 7 did not toll the statute of limitations (R. 156); and

That the statute of limitations both in Pennsylvania and Illinois was one year, and, therefore, had run prior to the commencement of the action and prior to the proffered amendment to the complaint (R. 154-156).

It was at R. 153 (middle of the page), 166 F. (2d) 127 at p. 134 (end of the page where the key numbers 9-11 appear), that Judge Biggs turned to the conflict of laws, and asked himself:

> "What is the Pennsylvania conflict-of-laws rule when publication of defamatory material takes place both within and without the State of Pennsylvania?"

Before answering his own question, he cited *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, and restated his decision as to Pennsylvania substantive law:

> "As we have stated, we believe that the courts of Pennsylvania will follow the 'single publication' rule as a matter of Pennsylvania tort law."

It would have been natural to expect that if Pennsylvania recognizes only the first "single publication", the Pennsylvania conflict of laws rule must be to seek the one jurisdiction where the "single publication" took place. For if Pennsylvania recognizes only one cause of action, its Judges must, in applying the conflict of laws, look only to find where *that* cause of action arose. This principle, which might almost be said to be a law of human reasoning, let alone a judicial rule, has frequently been called "the law of primary characterization" or "qualification" of the pleadings, and has universally been recognized as necessarily gov-

erned by and in accordance with the substantive law of the forum. Restatement, Conflict of Laws § 7. Cormack, Renvoi Characterization, Localization and Preliminary Question in the Conflict of Laws, 14 So. Calif. Law Review 220, 224 (1941). 1 Beale, Conflict of Laws (1935), 55, §§ 7.1, 7.2. Beale, The Conflict of Laws, 1886-1936, 50 Harvard Law Review 887, 890 (1937). Cheshire, Private International Law (1938) 27-34. Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar. Rev. 235, 244 (1937). Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col. L. Rev. 247, 262-263 (1920). Meriggi, Conflicts of Laws—A Theoretical Approach, 14 Boston Univ. L. Rev. 319, 323-329, 348 (1934). Robertson, Characterization in the Conflict of Laws (1940), 25-27, 68-69.

Judge Biggs, however, after the sentence in his opinion recognizing that Pennsylvania applies the "single publication" rule, turned about, saying:

> "This does not mean, however, that the Pennsylvania courts will not refer the respective foreign publications to the appropriate foreign laws".

With great respect to the learned Circuit Judge, we submit that he went wrong precisely in his failure to grasp the significance of his own correctly chosen word "appropriate". The nub of the case lies in the fact that if Pennsylvania holds (as it does, and as Judge Biggs recognized that it does) that the substantive tort occurred at the single place of first publication, it must follow that the "appropriate" foreign law to which to refer is the law of that jurisdiction of "first publication". That is *the* only tort that the Pennsylvania forum is going to recognize.

Implications of the Opinion Below

Judge Biggs had aptly pointed out that the "single publication" rule is also a rule of public policy. But as a rule of public policy it would be completely destroyed if it were not followed in the domain of the conflict of laws. What would be the use to Pennsylvania of a rule that its Courts are going to apply only the law of the one place of first publication if they must forthwith turn about and consider themselves compelled by their own conflict of laws rule to apply the law of all the jurisdictions of the world that recognize a different substantive rule?

We must admit that no matter how absurd the result, the Circuit Court of Appeals would have had to follow it if indeed it was the law of Pennsylvania. Judge Biggs does cite at this point three Pennsylvania cases.[5] *Bayuk Bros.* v. *Wilson Martin Co.*, one of the cases cited, is in fact contrary to the holding of Judge Biggs. The *Bayuk* decision states that in Pennsylvania

> "The law of another state upon a subject involved in the trial of a cause *will be presumed* to be *the same* as the law of the forum in the absence of evidence to the contrary. It is *incumbent* upon him who alleges that it is different *to show* what it is to the court, who will judge of the sufficiency of the evidence, and its effect, and instruct the jury accordingly." (p. 197, emphasis added)

In the instant case, the plaintiff did not assert or urge in any way the applicability of the law of any foreign jurisdic-

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[5] *Bayuk Bros.* v. *Wilson Martin Co.*, 81 Pa. Super 195. *Sudol* v. *Gorga*, 346 Pa. 463, 31 A. 2d 118. *Klumph* v. *Dunn*, 66 Pa. 141.

tion. On the contrary, plaintiff insisted that the complaint was confined to the tort arising within the Commonwealth of Pennsylvania (R. 149, fn. 8).

And each of the three cited Pennsylvania cases related only to a single tort in a single foreign State. None of them dealt with a claim that there had been multiple torts. For example, in *Sudol* v. *Gorga,* 346 Pa. 463, 31 A. (2d) 119, the Court said:

> "Since this accident took place in Maryland, the legal standard by which it is to be determined whether or not a cause of action is created is the law of that state".

To set that case in the proper relation to this one, one would substitute for the word "accident" the word "publication". Pennsylvania would hold, as Judge Biggs himself agrees, that "this publication took place in Illinois", and would then say:

> "Since this publication took place in Illinois, the legal standard by which it is to be determined whether or not a cause of action is created is the law of that state".

Judge Biggs has it that the Pennsylvania Supreme Court would say:

> "Since under our substantive law this publication took place in Illinois, the legal standard by which it is to be determined by us whether or not a cause of action is created is the law of Texas and of every other state and country in the world that either party asks us to consider."

This was the conclusion of Judge Biggs:

> "It follows, therefore, that under the Pennsylvania conflict-of-laws rule the plaintiff was entitled, other questions aside, to maintain in the court below the causes of action which arose in those States which do not follow the 'single publication' rule as well as the cause of action which arose in Illinois, the State following the 'single publication' rule in which publication was first made, that first publication 'engrossing', as we have stated, the later Pennsylvania one."

Does not the learned Judge's statement carry its refutation on its face? He is saying that he has held that Pennsylvania does not recognize the publication in its own State as actionable *because that publication was "engrossed"* in the prior publication in Illinois, but that Pennsylvania would recognize the subsequent publication in any other State or country than its own as actionable. But surely if the first publication in Illinois engrosses the subsequent one in Pennsylvania, it must, for the purpose of the Pennsylvania courts, *engross the subsequent ones* in Texas, Turkey and Tibet.

The Circuit Court of Appeals has Pennsylvania applying every law except only its own law, and that notwithstanding that "Life" was printed in Pennsylvania itself. For a Federal Court to suppose that Pennsylvania would hold that it would be contrary to its law to recognize a cause of action based on the publication of a magazine in Pennsylvania, but that it would be consistent with its law to try in its Courts the effect of that publication in Texas, Turkey and Tibet, is so extraordinary as (we respectfully submit) plainly to invite inquiry by this Court.

APPLICABLE PENNSYLVANIA DECISIONS

Actually Judge Biggs, in developing a theory not suggested by counsel and which was in fact contrary to plaintiff's theory of recovery (R. 149, fn. 8), overlooked numerous Pennsylvania cases which were directly contrary to the conflicts rule contrived by the Court below. *Conroy* v. *Pittsburgh Times,* 139 Pa. 334, 21 A. 154. *O'Donnell* v. *Philadelphia Record Co.,* 356 Pa. 307, 51 A. (2d) 775. *Montgomery* v. *New Era Printing Co.,* 229 Pa. 165, 78 A. 85. *Summit Hotel Co.* v. *National Broadcasting Company,* 336 Pa. 182, 8 A. (2d) 302. In the *Pittsburgh Times* case, in the *Philadelphia Record* case and in the *New Era* case there was an alleged libel published in a Pennsylvania newspaper which admittedly circulated in other states. If the law of Pennsylvania was what the Court below thought that it was, the Supreme Court would in each of these cases have considered it its duty to go on and consider the laws of the other states. Actually, in each case the Court applied only the law of Pennsylvania, thereby disagreeing with the interpretation now put upon that law by Judge Biggs.

In the *Conroy* case, the Court noted that the Pittsburgh Times "circulated throughout Pennsylvania, West Virginia and Eastern Ohio". But in the lengthy opinion of Mitchell, Jr., no suggestion is made that the laws of West Virginia or Ohio were or ought to be considered. Again, in *O'Donnell* v. *Philadelphia Record Co.,* the record showed that the Philadelphia Record, with its caustic editorial on John O'Donnell of the Washington Times Herald, was read in all of the principal cities of the United States. Once again the Pennsylvania courts treated the question as one exclusively of Pennsylvania law. The same was true in the

New Era case where the complaint alleged circulation outside of Pennsylvania.

In the *National Broadcasting Company* case the complaint alleged that the defamatory statement had been broadcast "throughout the United States". Nevertheless, the Pennsylvania Supreme Court applied Pennsylvania law only and did not refer this statement to every one of the 48 states. This was particularly striking, since the Pennsylvania Supreme Court did refer to a different rule of law (absolute liability irrespective of intent or carefulness) which might exist in other states (8 A. (2d) 302, at p. 309, notes 21 and 22, and p. 310).

These decisions of the Pennsylvania Supreme Court are *directly contrary* to Judge Biggs' holding that:

> "* * * We * * * must treat the allegations of the complaint as to the places where publication occurred as covering the United States and the civilized countries of the world (R. 151)"

and that the Pennsylvania courts would refer each foreign publication to the substantive laws of the foreign jurisdictions (R. 153).

The decision below is also in conflict with decisions of the Pennsylvania courts to the effect that an action in Pennsylvania must comply with and conform to Pennsylvania's statute of limitations. Here Pennsylvania's period of limitations had expired. Under Pennsylvania decisions, the relief in Pennsylvania must be sought within the time and according to the descriptive character of the action known to the laws of Pennsylvania. *Freeman* v. *Lawton,* 353 Pa. 613, 46 A. (2d) 205. *Rosenzweig* v. *Heller,* 302 Pa. 279, 153 A. 346.

APPLICABLE DECISIONS IN OTHER CIRCUIT COURTS OF APPEAL

The decision of the 3rd Circuit Court of Appeals in the instant case is in direct conflict with decisions of the 2nd, 5th and 7th Circuit Courts of Appeal.[6] Second Circuit: *Sweeney* v. *Schenectady Union Publishing Company,* 122 F. (2d) 288, affirmed without opinion by an equally divided Court, 314 U. S. 605; *Grant* v. *Readers Digest,* 151 F. (2d) 733, cert. denied 326 U. S. 797; *Berg* v. *Printers' Ink,* 54 F. Supp. 795, affirmed upon opinion of District Court, 141 F. (2d) 1022; *Kirby* v. *Pittsburgh Courier,* 150 F. (2d) 480. Fifth Circuit: *Brinkley* v. *Fishbein,* 110 F. (2d) 62, cert. denied, 311 U. S. 672. Seventh Circuit: *Spanel* v. *Pegler,* 160 F. (2d) 619.

Each of these cases, like the instant case, was upon a complaint which alleged circulation throughout the United States.[7] In each case, however, the Circuit Court of Appeals in question construed the complaint and tested its sufficiency in accordance with the laws of the state *in which the action was brought, i.e.,* the forum. No other law was applied.

In the *Schenectady Union* case, the complaint alleged that the "Schenectady Union Star" was widely circulated and read in the State of New York *and the states of the*

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[6]Also in conflict with the instant case: *Holden* v. *American News Co.,* 52 F. Supp. 24 (D. C. E. D. Wash., Schwellenbach, J.), appeal dismissed (C. C. A. 9th, 1944) 144 F. (2d) 249. *Curley* v. *Curtis Pub. Co.,* 48 F. Supp. 29, 30 at note 3 (D. Mass., Wyzanski, J.).

[7]Except the *Pittsburgh Courier* case, where the complaint alleged that the "Courier" was "generally and extensively circulated throughout the States of Pennsylvania, New York, Mass., New Jersey, California, Illinois, and other states of the United States and elsewhere" (Complaint, Transcript of Record, 2nd Circuit Court of Appeals).

United States and among the people thereof" (Transcript, 2nd Circuit, Court of Appeals, pp. 2-3, 4).

In the *Readers Digest* case, the complaint alleged that the periodical "is of general circulation *in the United States* of America and *throughout the world* and widely read by * * * the general public" (Transcript, 2nd Circuit Court of Appeals, p. 2). There, plaintiff specifically urged that the case was "not controlled solely by the law of New York" (Appellant's Brief, p. 6). The question presented was the sufficiency of the complaint. The 2nd Circuit Court of Appeals specifically held that New York law governed and refused to consider the substantive law of the other jurisdictions. The Court held that it would not, upon the facts pleaded, refer to the law of any state other than New York, that, upon the motion testing the sufficiency of the complaint, the Court was not presented with any *question* of choice of law as among the various states in which "The Readers Digest" circulated. (151 F. (2d) at 734)

In the *Printers' Ink* case, the complaint alleged that "Printers' Ink" was "circulated throughout the United States" (Transcript, 2nd Circuit Court of Appeals, pp. 3, 69).

In *Brinkley* v. *Fishbein*, in the 5th Circuit Court of Appeals, the complaint alleged that the periodical "Hygeia" is a "magazine published monthly by the American Medical Association, and circulated, sold and distributed by said association of which this defendant is editor, *throughout the United States* of America and the towns and cities thereof, including the City of Del Rio and County of Val Verde, Texas, and was, and is, being read generally by the American public" (Transcript, 5th Circuit Court of Appeals, p. 5).

In *Spanel* v. *Pegler,* in the 7th Circuit Court of Appeals, the complaint alleged that Westbrook Pegler's column was circulated *"throughout the United States",* and that it was published and circulated in "The Chicago Herald-Examiner" which was read "frequently and regularly by six to ten millions of readers *throughout the United States,* including readers in said City of Chicago, County of Cook, and State of Illinois" (Transcript, 7th Circuit Court of Appeals, pp. 4, 7, 9, 10, 13).

In each of the cases cited above, the Court applied the law of the state in which it was sitting in construing and testing the complaint. If in the present case the Circuit Court of Appeals below had followed the same rule of construction, it would have been compelled to dismiss the action on the ground that only a single cause of action is pleaded in the complaint, only the "first publication" is actionable, and that the single cause of action was barred by Pennsylvania's statute of limitations.

The rule of construction adopted by the 2d, 5th and 7th Circuits, curiously enough, was urged upon the 3d Circuit Court of Appeals in our case (R. 149, fn. 8) *by the plaintiff.* Had the 3d Circuit Court of Appeals accepted plaintiff's construction of his own complaint, he would have been defeated by it as soon as the Court should hold, as in the event that it did, that no cause of action lay for publication in Pennsylvania. By rejecting his argument, the Court put a different construction upon the complaint from that which had been put by the 2d, 5th and 7th Circuits upon the complaints in the cases cited above, and thereby created a conflict of circuits.

Res Judicata

It may be that this particular case could be disposed of in the District Court on the ground of *res judicata.* Although the Circuit Court of Appeals did not direct that judgment be entered in petitioner's favor on this ground, it refrained from doing so only because it said that the Massachusetts record which was introduced before the Circuit Court of Appeals was not clear; and it left that question to the District Court, with the instruction that if it should appear that the Massachusetts Court had reached its decision on the basis of *res judicata,* then the District Court must in turn, under the full faith and credit clause, recognize the Massachusetts judgment as binding upon it.

But if this result is reached favorably to the defendant, it will not eliminate from the Federal Reporter the extensive and erroneous decision of the Circuit Court of Appeals on the infinitely more important subject of the conflict of laws. It will properly be taken by other Courts that the authority of the Circuit Court of Appeals opinion remains intact on that subject.

It is perhaps unfortunate that the Circuit Court of Appeals did not, on reaching its conclusion that the case might be disposed of in favor of the defendant because of the requirement of full faith and credit to the Massachusetts judgment (a conclusion which it reached only on the rehearing), thereupon withdraw its own opinion on the subject of the conflict of laws. We may say, however, that we sympathize with the Circuit Court of Appeals in its not doing so, for (as already mentioned) its opinion on the conflict of laws was the result of nearly a year of labor.

Yet the greater the labor and the greater the scholarship of Judge Biggs, the more dangerous for the publishing industry of the United States and for the orderly conduct of the District Courts if his labor and research were in the end deflected to a wrong result. The more the respect due to him, the greater the consequent injury done by him if he in fact fell into error in the end. This is why we persist in the petition for certiorari, which in the end comes down to this: That the decision below is so important, so extraordinary and so plainly contrary to the local law of Pennsylvania (as applied in the *Conroy, O'Donnell, New Era,* and *Summit Hotel* cases, *supra*), as to call for review, regardless of technical rules as to its finality.

But if the case is to come here, then the Court will doubtless wish also to consider the question of *res judicata.* That question is also of importance. Although not in our opinion of sufficient importance to have moved us to petition for the issue of a writ, it is, we submit, of at least sufficient importance to be considered once the writ has been issued on another ground.

There are two *res judicata* questions:

(1) Where two cases involve the same parties and the same subject matter, is a prior decision in one jurisdiction (in this case, prior decisions to the same effect in the District of Columbia, in New York and in Massachusetts) that the action is barred by the statute of limitations a decision "on the merits" requiring application of the rule of *res judicata,* either as a matter of local law or because of the full faith and credit clause?

(2) Is the record in the Massachusetts Superior Court sufficient as a basis for decision?

We will explain these briefly in order:

First. The Circuit Court of Appeals held that it was not bound by the prior decisions in the District of Columbia and New York (which were based upon the statute of limitations), that they were not binding as decisions on the merits. In this we believe the Court below also committed error. *Cf. Angel* v. *Bullington,* 330 U. S. 183.

Second. As to Massachusetts, the Circuit Court of Appeals recognized that the full faith and credit clause might compel a different result, because the Massachusetts action was dismissed on two alternative grounds—the statute of limitations of Massachusetts and *res judicata* itself. In Massachusetts a pre-trial was ordered and held on February 25, 1946, on two issues,—the statute of limitations and *res judicata,*—the first with a jury, the second only by the Court. The jury found in defendant's favor on the statute of limitations, and the Court independently ruled that the defense of *res judicata* was established. The action was dismissed on both grounds. The Circuit Court of Appeals, adverting to a rule that "where there are two issues in a case, upon either of which a judgment may rest, the one going to the merits and the other not, its disposition is generally considered as resting upon the latter, so that the merits remain unadjudicated, unless the judgment appears to have been upon the merits", left it to the District Court to determine whether the Massachusetts judgment was indeed upon the defense of *res judicata* as well as upon the defense of the statute of limitations.

But the record before the Circuit Court of Appeals and before this Court includes as original exhibits (in the shorter of the two records bound with blue ribbon) a folder,

in which (i) the Chief Justice of the Superior Court of Suffolk County, Massachusetts, certifies that one Thomas Dorgan, Esquire, is Clerk of said Superior Court and that his acts are entitled to full faith and credit, and (ii) said Thomas Dorgan attests as a true copy an order of said Superior Court to the following effect:

> "This cause came on to be heard on an order of the Court dated September 14, 1945, whereupon, after hearing in relation to Paragraph #3 of said order of the Court, it is hereby found and ruled that the defense of res judicata is established.
>
> By the Court, Forte, J.
>
> Edward U. Lee
> Assistant Clerk."

The whole are bound together by and under the seal of the Superior Court of Suffolk County. No question was raised by the respondent as to their correctness. Under these circumstances, it is submitted that the Circuit Court of Appeals should have disposed of the case as *res judicata* in Massachusetts.

JURISDICTION TO REVIEW

Jurisdiction of this Court is invoked under the Judicial Code, § 240-(a), as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347-(a)). The date of the order and judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was entered September 23, 1947, as amended by order of said Circuit Court of Appeals entered February 3, 1948.

QUESTIONS PRESENTED

(1) Has the Circuit Court of Appeals decided an important question of Pennsylvania law in a way in conflict with applicable local decisions?

(2) Has the Circuit Court of Appeals decided an important question of Federal law in conflict with decisions of the 2nd, 5th and 7th Circuit Courts of Appeal?

(3) In an action in which an alleged libel has appeared in a publication with nation-wide and world-wide circulation, in a forum in which the substantive law is that only the first publication of a libel is actionable and which has applied only its own law to libels printed in the State and circulating outside the State, shall the Federal Courts follow the local law and apply only the law of first publication, or shall it examine into and apply the law of every State and nation which may have a different rule of substantive law, to-wit, a rule that every subsequent publication in every jurisdiction constitutes a new actionable libel?

(4) Where a complaint alleges a single cause of action for libel, and the complaint shows that the libel in fact circulated outside the State of first publication, shall the Federal Court construe the complaint as alleging a libel arising only under the laws of the State where the action was brought, or shall it examine into and apply the law of every State and nation in which the libel subsequently circulated?

(5) Upon the facts stated in the two previous questions, and where the action is commenced after the period of limitations of the forum has expired, may the action nevertheless be maintained?

(6) When the Courts of three different jurisdictions, in all of which the period of the applicable statute of limitations is the same as in the forum, have, in actions between the same parties involving the same facts, dismissed them under the statute, is the defendant entitled to the defense of *res judicata,* either (a) under the law of Pennsylvania, or (b) because required by the full faith and credit clause of the United States Constitution, Article IV, sec. 1?

(7) Is a judgment of the Superior Court of Massachusetts that the defense of *res judicata* has been established effective in Pennsylvania as a bar to the same cause of action between the same parties, either (a) under the law of Pennsylvania, or (b) because required by the full faith and credit clause of the United States Constitution, Article IV, sec. 1?

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals has decided an important question of Pennsylvania law in a way probably in conflict with applicable local decisions.

The question of law is important, because on its answer depends whether the District Court, in any libel action in which the defendant is a publication with a nation-wide or world-wide circulation (and there are very many such publications today), must consider the law of every jurisdiction in the world,—a requirement which would place an intolerable burden upon the District Courts.

The decision below is in conflict with the applicable local decisions, because

(i) admittedly the substantive law of Pennsylvania is that it will recognize only a single cause of action for

the single original publication, and in similar cases where the libel was printed in that State and circulated in other States the Pennsylvania courts have applied only the law of Pennsylvania; and

(ii) the instant action was brought after the expiration of one year (Pennsylvania's period of limitations) after the libel was first published, and Pennsylvania courts hold that an action in Pennsylvania must comply with and conform to Pennsylvania's statute of limitations.

2. The Circuit Court of Appeals has decided a question of pleading in conflict with the decision of other circuit courts of appeal on the same subject matter.

The Circuit Court of Appeals construed the complaint as stating a cause of action based on whatever publication the magazine may have had in any state or country. This was in direct conflict with the decisions of the

2nd Circuit Court of Appeals in *Sweeney* v. *Schenectady Union Publishing Company,* 122 F. (2d) 288, affirmed without opinion by an equally divided Court, 314 U. S. 605; *Grant* v. *Readers Digest,* 151 F. (2d) 733, cert. denied 326 U. S. 797; *Berg* v. *Printers' Ink,* 54 F. Supp. 795, affirmed upon opinion of District Court, 141 F. (2d) 1022; *Kirby* v. *Pittsburgh Courier,* 150 F. (2d) 480; and the

5th Circuit Court of Appeals in *Brinkley* v. *Fishbein,* 110 F. (2d) 62, cert. denied, 311 U. S. 672; and the

7th Circuit Court of Appeals in *Spanel* v. *Pegler,* 160 F. (2d) 619.

3. By denying *res judicata* to the judgments in favor of petitioner in the District of Columbia and the State Courts of New York and Massachusetts, the Circuit Court of Appeals has decided an important question, if one of local law, in a way probably in conflict with applicable Pennsylvania decisions, and if one of Federal law, in a way probably in conflict with decisions of this Court and with the requirements of the full faith and credit clause of the United States Constitution, Article IV, sec. 1.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Judicial Circuit, sitting at Philadelphia, Pennsylvania, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the orders and judgments of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

TIME, INC.

by

WM. DWIGHT WHITNEY
Attorney for Petitioner,
15 Broad Street,
New York, N. Y.

April 29, 1948.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court (R. 33-50) has been reported at 64 F. Supp. 671. The original opinion of the Circuit Court of Appeals (R. 87-103) is unreported. The opinion of the Circuit Court of Appeals, as amended (R. 136-164), has been reported at 166 F. (2d) 127.

ARGUMENT

Point I

THE COURT BELOW MISCONSTRUED AND FAILED TO APPLY LOCAL LAW BUT DEVISED AN ENTIRELY NOVEL AND IMPRACTICABLE CONFLICT-OF-LAWS RULE.

Under Pennsylvania substantive law the facts alleged in the complaint (assuming its sufficiency) constitute only one cause of action.[1] Under Pennsylvania private international law, this single cause of action arose in Illinois[2]

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[1]Both the District Court (R. 44) and the Circuit Court of Appeals so found (R. 153).

In addition to the several cases cited by the Court below for the proposition that Pennsylvania follows the "single cause of action" rule, the following cases clearly recognize only a single cause of action upon facts similar to those in the instant case. *Conroy* v. *Pittsburgh Times,* 139 Pa. 334, 21 A. 154. *O'Donnell* v. *Philadelphia Record Co.,* 356 Pa. 307, 51 A. (2d) 775. *Summit Hotel Co.* v. *National Broadcasting Company,* 336 Pa. 182, 8 A. (2d) 302. In each case, the defamation was circulated outside of Pennsylvania, but the Pennsylvania Supreme Court applied only Pennsylvania law and did not refer for its decision to the law of the foreign jurisdictions.

[2]The Court below so found. It referred to *"the* 'single publication' cause of action arising in Illinois, the only cause of action arising under the 'single publication' rule" (R. 15).

and Illinois law is therefore applicable in determining the legal rights and obligations of the parties. Under Illinois law, also, the complaint states only one cause of action.[3] Under Pennsylvania private international law, the law of the state of the forum (Pennsylvania) governs in determining whether the action was timely brought—that is to say, the statute of limitations of the state of the forum must be complied with.[4] Under either Pennsylvania or Illinois law, the cause of action pleaded in the complaint arose prior to January 17, 1944, and was barred after the expiration of one year.

The only conclusion, legal or logical, to be deduced from the propositions of law referred to above is that reached by the District Court—that the action may not be maintained in Pennsylvania.

The Circuit Court of Appeals, however, in its completely unprecedented decision, held that the complaint must be viewed *not only* from the standpoint of Pennsylvania and Illinois law *but also* from that of the law of every jurisdiction in which Life was circulated (forty-eight states and almost every civilized country). The Court went on to hold that, so viewed, the complaint in reality pleads an *unspecified number* of separate and distinct causes of action arising under the laws of *all* those states and nations which might hold that separate and multiple causes of action for libel arose within their respective jurisdictions upon the facts pleaded.

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[3]The Court below so found (R. 152), citing *McGill* v. *Time*, Circuit Court of Cook County, quoted *infra*.

[4]*Freeman* v. *Lawton*, 353 Pa. 613, 46 Atl. (2d) 205 (1946); *Rosenzweig* v. *Heller*, 302 Pa. 279, 153 Atl. 346 (1931), and cases cited.

The Circuit Court of Appeals remanded the case to the District Court for it to determine how many such jurisdictions exist (and consequently how many separate causes of action are pleaded in the complaint). The Court, having undertaken an independent research on the subject, said that Texas and probably Kentucky and Washington were among those jurisdictions which would follow the so-called "multiple causes of action" rule, and that if in fact any copies of "Life" were circulated, exhibited or read within any such jurisdiction within one year prior to the commencement of the action, then recovery must be allowed for such separate and new causes of action.

In so holding, the Circuit Court of Appeals failed to apply Pennsylvania law. It in fact devised an entirely new conflict-of-laws rule which may be stated as follows:

> Whenever more than one state or nation is touched by or has an interest in the adjudication of an alleged tort, it becomes the *absolute* duty of the trial forum to determine the substantive law of *every* such state or nation before it (i) characterizes the facts stated in the complaint, or (ii) determines the number of causes of action pleaded in the complaint, or (iii) determines the place where the cause or causes of action arose.
>
> If there happen to be certain states or nations (not named in the complaint)[5] which recognize separate multiple causes of action arising within their respective

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[5]The complaint only referred generally to the fact (par. 7) that "Life" is "distributed weekly in all parts of the city and Commonwealth of Pennsylvania [sic], as well as the United States of America, and in most of the civilized countries of the entire world * * *" and that (par. 8) "Life" is "sold, distributed to and read by several millions of persons in all parts of the world, including the city and Commonwealth of Pennsylvania" (R. 4).

jurisdiction upon the facts stated in the complaint, then the trial forum must *construe* the complaint as alleging such separate multiple causes of action and then apply the substantive laws of those particular states and nations, even though only one cause of action is recognized under the substantive law of the forum and only one cause of action is stated in the complaint.

Even though the single cause of action recognized by the substantive law of the forum is barred by the statute of limitations of the forum, if the separate multiple causes of action would not be barred, then the forum must adjudicate each of those causes of action.

The practical difficulties which will face a trial court in order to comply with the rule laid down by the Circuit Court of Appeals are staggering. It follows that (i) the trial court must test the sufficiency of the libel by the law of each nation and state to ascertain whether any, and how many, causes of action are set forth, and that (ii) trial courts must charge the jury upon the substantive law and time limitation of each jurisdiction, and that (iii) trial courts are obliged to entertain as many separate actions as there are separate copies (of a particular issue of a magazine or newspaper) which circulate in jurisdictions having the "multiple causes of action" rule. To impose upon counsel and court the task, in the trial of a single lawsuit, of examining the law of each of the states of the United States and each of the countries of the world with regard to substantive libel rules and the applicable statute of limitations, is surely a result which deserves the attention of this Court before it becomes a part of the law even of a single circuit. The rule, if followed as a precedent, brings every state down

to the level of the most backward, and constitutes in each state an interdict against progress in revision of its substantive and procedural law. It would completely nullify the public policy of a majority of the states and force them absolutely and completely to yield to a contrary policy of a minority.

Errors committed by the Circuit Court of Appeals in applying rules of private international law.

In the field of private international law, the Circuit Court of Appeals committed three successive and serious errors. These errors would establish novel and thoroughly impracticable law as authoritative precedent in the Federal Courts. The errors of the Court, if we may respectfully suggest, were: (1) In the initial process of "primary characterization", by rejecting the domestic law of the forum and applying foreign law; (2) In holding that the trial court must adjudicate causes of action strongly repugnant to the domestic law of the forum; (3) In holding that the trial court must adjudicate causes of action barred by the domestic statute of limitations of the forum.

(1) "Primary characterization" must be in accordance with the law of the forum.

It is clear from the opinion and holding of the District Court below, from the language in the opinion of the Circuit Court of Appeals and from decisions of the Pennsylvania courts that if Pennsylvania law only is applied in the initial process of "primary characterization"—i.e., in construction of the pleadings, in determining the nature of the tort alleged, the number of causes of action pleaded in the complaint and in determining the place where the cause

of action arose, a result contrary to the decision of the Court below is reached. As the District Court held, Pennsylvania substantive law recognizes only *one* cause of action arising upon the facts before the Court and that cause of action was barred after one year from the date of first publication.

The District Court was correct in characterizing the facts in accordance with Pennsylvania law. The Court must of necessity construe the pleadings in accordance with the law of the state where the action was brought. It is settled beyond doubt in American jurisprudence that construction of the allegations of the complaint, or "primary characterization" or "qualification" of the pleadings, is governed by and is in accordance with the substantive *lex fori*. Restatement, Conflict of Laws § 7. In American and English jurisdictions—and Continental opinion is largely in accord—the law of forum must be applied in taking this first step in a case where a choice of conflicting laws is required.

This initial step, called the determination of "the quality and character of legal ideas" by the American Law Institute (Restatement, Conflict of Laws, § 7), is also referred to as the "determination of the nature of the problem presented to the court for solution". 14 So. Cal. Law Review 221, 223-4. The function of the process of primary characterization is "to put upon the facts a legal complexion". *Ibid.* It is elemental that the forum must perform this process of characterization "in accordance with its own views—that is, the forum will not inquire whether or not the problem is similarly characterized by the jurisdiction to which the forum looks as the result of its own determination of the character to the problem." *Id.* at 224.

Where, as here, a question exists as to what law should be applied, the basic questions—how many causes of action

arose? how many causes of action are pleaded? where did the cause of action arise?—must of necessity be decided with reference to the law of the forum, *i.e.*, the law of the state where the action was brought.

This rule is the law of Pennsylvania, as it is the law of every American jurisdiction. A correct statement of Pennsylvania's conflict of laws rule is contained in *Harry L. Sheinman & Sons* v. *Scranton Life Ins. Co.*, 125 F. (2d) 442, 444 (C. C. A. 3rd, 1942, per Jones, J.):

> (i) "the obligations of a contract of insurance are to be enforced according to the law of the place of contracting."
>
> (ii) "In turn, the place of contracting is to be ascertained *by the law of the forum.*"
>
> (iii) "The rule of conflicts, therefore, to be followed by the trial court *in the first instance* was the rule of Pennsylvania."

Decisions of the Pennsylvania State courts are to the same effect. *Conroy* v. *Pittsburgh Times,* 139 Pa. 334, 21 A. 154. *O'Donnell* v. *Philadelphia Record Co.*, 356 Pa. 307, 51 A. (2d) 775. *Summit Hotel Co.* v. *National Broadcasting Company,* 336 Pa. 182, 8 A. (2d) 302. *See* discussion of these cases *supra* at pages 12, 13.

In *United Factors Corp.* v. *Mogul,* 142 Pa. Super. 506, 16 A. (2d) 735, 736, 737, the instrument in question was first characterized and construed in accordance with Pennsylvania law, after which it was decided that New York substantive law was applicable. The *Mogul* case also holds that in Pennsylvania in order for a plaintiff to take advantage of the law of a foreign jurisdic-

tion, the plaintiff should specifically invoke such laws by naming the particular state where the controlling facts occurred and serve notice that such law is being invoked. (To same effect, *Bayuk Bros. Inc.* v. *Wilson Martin Co.*, 81 Pa. Super. 195, 197, cited by the Court below for another point.) In *Mike* v. *Lian,* 185 Atl. 775 (Pa. 1936), the court made the necessary choice of law, determined that the cause of action arose in Ohio and thereafter investigated Ohio law. In *Centofanti* v. *Pennsylvania Railroad Company,* 90 Atl. 558 (Pa. 1914), negligent acts had been committed in Pennsylvania as a result of which a death occurred in New Jersey. In that case, the court determined that the cause of action arose in Pennsylvania. It mattered not that a New Jersey court might have found a cause of action to have arisen in New Jersey.

The first error that the Court below committed, then, was in applying a foreign and radically different substantive law in the process of primary construction of the facts. This error is particularly obvious and particularly grave where, as here, the court chooses a law which is so completely repugnant to and destructive of the public policy of the forum.

(2) Recognition and adjudication of multiple causes of action is repugnant to the public policy of the forum.

The basis for the over-riding public policy underlying the substantive "single cause of action" rule is obvious.[6]

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[6]The Circuit Court of Appeals stated that the single cause of action rule of Pennsylvania "is the preferable one and is recommended both by logic and by public policy" and that having proper regard for "the freedom of the press * * * newspapers and magazines which are published on a nationwide basis, should not be subject to the harassment of repeated suits" (R. 153).

(a) To Prevent Repetitious and Needless Litigation.

The public policy behind Pennsylvania's substantive rule of law—the "single cause of action" rule—is, in the first place, to prevent endless, repetitious, needless and burdensome litigation in a situation where a plaintiff can have everything he seeks in a single action. Under the rule established below a plaintiff is permitted to bring an unlimited *number* of actions upon an alleged libel contained in a newspaper or magazine. No purpose can be served by requiring a sister state to recognize and adjudicate an infinite number of cases upon one particular issue of a publication. On the contrary, a state may, with perfect propriety, refuse to lend its courts when to do so would impede their work. The policy of preventing repetitious, needless litigation has always been respected—indeed *required*—by this Court. *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316, and cases cited at p. 320. *Baird* v. *U. S.,* 96 U. S. 430, 432. *Beloit* v. *Morgan,* 74 U. S. 619, 622. A clearer situation where the enforcement of foreign law would "lead to disturbance and disorganization of the local municipal law" (*Griffin* v. *McCoach,* 313 U. S. 498, 506) is impossible to imagine. In those circumstances it is "rudimentary" that a state need not and "will not lend the aid of its courts" to enforce rights under foreign law. *Ibid.*

(b) To Prevent Unnecessary Harassment of the Press.

A secondary, but perhaps equally important, basis for the "single cause of action" rule, is the public policy of protecting the freedom of the press, of preventing undue

and needless harassment of the press. The Court in *McGill* v. *Time, Inc.*, Circuit Court, Cook County, Illinois, March 23, 1945, No. 44C5903, emphasized this aspect of the public policy underlying the "single cause of action" rule, saying:

> "Now, if I were to accept, for instance, in this case, *the theory of the plaintiff that the sale or distribution* of every paper published on a certain day, or every magazine published on a certain day *constituted a new publication upon which an independent lawsuit could be brought, I would be subscribing to a policy of discrimination against the press,* rather than a policy which gives it a favorable position in our national life. For we must take notice that newspapers are retained in libraries, they are retained for their historic value, or for their general literary value, and if counsel for plaintiff was right, *then every time someone came into a public library and picked up a magazine of ten, fifteen, or twenty years ago,* and read a libelous article there, that would be a new publication and a new cause of action would arise. * * * And therefore, unless we hold that the publications intended for public distribution are published only once, no matter how many copies of it are in circulation, and that if they contain libelous matter, the statute of limitations begins to run when that publication is made, unless, indeed, there is a reissue of it subsequently,—I say, unless we so hold, *then the statute of limitations never would run in favor of any publishing house which issues a publication for general public distribution.*" (Emphasis added.)

Protection of the press from *undue* and *unnecessary* harassment is undoubtedly a legitimate ground for refusing to adjudicate the kind of tort said to be recognized in a minority of jurisdictions, and the strong public policy underlying the "single cause of action" rule constitutionally over-rides

the recognition of multiple causes of action. *Griffin* v. *McCoach,* 313 U. S. 498. *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 436-7. *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, 489. *Union Trust Co.* v. *Grosman,* 245 U. S. 412. *Pink* v. *A.A.A. Highway Express, Inc.,* 314 U. S. 201. *Cf. Grosjean* v. *American Press Co.,* 297 U. S. 233, 242-9. *Near* v. *Minnesota,* 283 U. S. 697, 713.

In the present case the interest of the state of the forum in the transaction in question is clear. The entire issue of "Life" was printed in Pennsylvania and Illinois; no copies were printed in Texas, Kentucky or Washington. The complaint alleges that Time, Inc., the defendant, was doing business in Philadelphia and maintained a place of business in that city (par. 2). Assembling, printing and proofreading of the magazine was done in Philadelphia, and copies of the magazine were mailed from Philadelphia to subscribers and distributors (R. 14-15). The magazine was circulated and read throughout the city of Philadelphia and the commonwealth of Pennsylvania. Where, as here, the interests of the state of the forum are substantial, the public policy of the state of the forum controls. *Griffin* v. *McCoach,* 313 U. S. 498, 507.

(3) In any event, the statute of limitations of the forum bars the action.

Even if we assume *arguendo* that Pennsylvania voluntarily (or involuntarily) will recognize and adjudicate, multiple torts arising under Texas, Kentucky and Washington law, and that the complaint has been properly construed as pleading separate torts arising in such foreign jurisdictions—it still does not follow that for the purpose of *time limitation* Pennsylvania must recognize and adjudicate those torts after the expiration of one year.

A public policy of Pennsylvania, separate from that expressed in its substantive law, is expressed in its statute of limitations—viz., to refuse to adjudicate an alleged defamation unless it is brought "within one year next after the words spoken, and not after". (12 P. S. Pa. § 31.)[7] The Pennsylvania statute of limitations bars an action upon a particular issue of a newspaper or magazine after the expiration of one year from the time when the libel was first published.

The fact that another state says that publication of a particular issue of Life occurs, under its law, upon date "X" or "Y" or "Z" is irrelevant to a consideration of Pennsylvania statute of limitations. It is within the legislative power of Pennsylvania to say that a cause of action for libel must be brought, if at all, in its courts within one year from any relevant date. It could—and has—said that that date is when the words are first spoken. For purposes of the statute of limitations in Pennsylvania the words are only spoken once when one particular issue of a newspaper or magazine is involved. Just as it is within the legislative power of Texas or Kentucky or Washington to say that a separate tort occurs upon every copy, it is also within the legislative power of Pennsylvania to refuse to adjudicate that tort—even if it should consent to recognize it if timely brought—after the expiration of one year from the date when copy is first given to the printer.

Upon this question Mr. Justice Story, in *United States Bank* v. *Donnally,* 8 Pet. (33 U. S.) 361, 372, held that:

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[7]The language quoted was extended by a subsequent statute to include "all cases of slander or libel, whether spoken, written or printed" (12 P. S. Pa. § 32). The District Court found that "These statutes obviously accentuate the importance of the date of publication of the alleged libel" (R. 46).

> "The remedy in Virginia [the state of the forum], must be sought within the time, and in the mode, *and according to the descriptive character* of the instrument, known to the laws of Virginia, and not by the *description and character* of it, prescribed in another state." (Emphasis added.)

A completely different public policy toward and characterization or "descriptive character" of libel, for the purposes of time limitations, is embodied in the laws of the "multiple causes of action" nations and states. The effect of the "multiple causes of action" rule, for purposes of the statute of limitations, is that the statute of limitations would never toll. See *McGill* v. *Time, Inc.*, C. C. Cook Co., Illinois, quoted *supra*. This obvious fact was also recognized by the District Court for the Southern District of New York, in *Means* v. *MacFadden Publications*, 25 F. Supp. 993, where it was said:

> "In the opinion of the Court, this [each sale by news stands] does not constitute a republication of the alleged libelous articles.
>
> "The contention of the plaintiff cannot be correct. If her contention is correct, *the Statute of Limitations would never toll;* certainly never as long as there was in existence, an issue of these magazines which was capable of being passed about or sold. * * *
>
> "The Statute of Limitations is a statute of repose. If the contention of the plaintiff is correct, *the very purpose of the Statute would be defeated.*" (pp. 994-995, emphasis added.)

The same fact is recognized in *Wolfson* v. *Syracuse Newspapers, Inc.*, 254 App. Div. 211 (4th Dept., 1938), aff'd, 279 N. Y. 716 (1939), where the Court said:

> "* * * Believing that such a [multiple causes of action] rule would nullify the clear purpose of the Statute of Limitations, we affirm the order dismissing the amended complaint and the judgment entered thereupon, with costs." (254 App. Div. at 212-213.)

The statute of limitations of the forum embodies the state's public policy. *M'Elmoyle* v. *Cohen,* 13 Pet. (38 U. S.) 312. *Freeman* v. *Lawton,* 353 Pa. 613, 46 Atl. (2d) 205 (1946). *Rosenzweig* v. *Heller,* 302 Pa. 279, 153 Atl. 346 (1931), and cases cited. And in actions brought in Pennsylvania courts, the statute of limitations of Pennsylvania must be observed. *Ibid. Order of Travelers* v. *Wolfe,* 331 U. S. 586, 607, 627. Pennsylvania law is based upon the "practical realization," as the District Court said (R. 45), that under a contrary rule "the purpose of the statute of limitations would be avoided."

Pennsylvania's private international law, as the District Court below properly found, is to the effect that

> "* * * the *date* of 'publication' *for the purpose of invoking the statute of limitations,* is, of course, to be determined *according to Pennsylvania* law * * *." (R. 43)

Not only the length of the period of limitation but also the date when the statute of limitations begins to run is determined in accordance with Pennsylvania law. *Freeman* v. *Lawton,* 353 Pa. 613, 46 A. (2d) 205. *Rosenzweig* v. *Heller,* 302 Pa. 279, 153 A. 346 (and cases cited).[8]

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[8]In *Freeman* v. *Lawton* the Pennsylvania Supreme Court held that the domestic law of the forum controlled for the purpose of determining whether an action is barred by the statute of limitations. In that case promissory notes were involved which were

The holding of the Circuit Court of Appeals that the multiple causes of action were not barred by Pennsylvania statute of limitations ignores a Pennsylvania law that is plain, clear and certain. The Court below has held that, in spite of Pennsylvania statute of limitations, the trial court must adjudicate alleged causes of action for libel upon a particular issue of "Life" so long as a copy appears in a public library in Texas, Kentucky or Washington (or other jurisdictions with similar law) and so long as residents of Texas, Kentucky or Washington continue to read copies of that issue. Such a holding flagrantly ignores and nullifies the purpose of Pennsylvania's statute of limitations.

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executed and payable in Florida for the purchase of Florida land. Nevertheless, the Pennsylvania Supreme Court rejected Florida law, in so far as time limitation was concerned, and determined the legal effect of the instrument in accordance with Pennsylvania law. Although the action was timely brought under Florida law, it was barred under Pennsylvania law and the Pennsylvania Supreme Court consequently entered judgment for the defendant.

Rosenzweig v. *Heller* is another direct holding in support of the statement of the District Court below of the conflict of laws rules of Pennsylvania. In the *Rosenzweig* case, the Pennsylvania Supreme Court, for the purpose of applying the statute of limitations of Pennsylvania, characterized the cause of action in accordance with Pennsylvania substantive (statutory) law and held that the action was barred by the Pennsylvania statute of limitations.

Still another direct holding in support of the statement of the District Court below of the Pennsylvania conflict of law rules is *Otis* v. *Bennett,* 91 F. (2d) 531, a decision by the Third Circuit Court of Appeals itself, where the *length* of the statutory period *and* the *date* when the statute *begins to run* was determined by Pennsylvania law.

Point II

THE DECISION OF THE COURT BELOW DENIES FULL FAITH AND CREDIT TO THE JUDGMENTS OF NEW YORK, DISTRICT OF COLUMBIA AND MASSACHUSETTS COURTS.

The judgment of the Court below, reversing the District Court, refused full faith and credit to the judgments of New York, District of Columbia and Massachusetts.[9] The reason given by the Court was that the prior judgments dealt only with "a procedural limitation but does not deal with substantive rights"—that a judgment "rendered on the ground of the statute of limitations usually is not a bar to a subsequent suit."

It is our contention that the "merits" of plaintiff's *claim* have been previously adjudicated, and that the same *issues* presented to the Court below had also been previously adjudicated.[10]

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[9]Article IV, § 1, of the Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," and provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

Congress has provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Act of May 26, 1790, c. 11, 1 Stat. 122, as amended, 28 U. S. C. § 687.

[10]The distinction beween "direct" and "indirect" estoppel by judgment is recognized in *Cromwell* v. *County of Sac,* 94 U. S. 351, 352-3. The distinction lies between (a) an adjudication having been previously made on the same claim, and (b) a previous adjudication on a different claim but involving issues attempted to be relitigated. In the former instance, the entire claim is barred and may not be relitigated, and in the latter, the same issues or questions are, as to same parties, forever settled. *Cf. Baltimore S.S. Co.* v. *Phillips,* 274 U. S. 316, 319. *Commissioner of Internal Revenue* v. *Sunnen,* 333 U. S. , 68 S. Ct. 715.

The holding of the Circuit Court of Appeals that the defense of statute of limitations does not go to the "merits" is both contrary to the express holding of the New York and District of Columbia courts that their judgments were entered in favor of the defendant "upon the merits,"[11] and to well-established law. *Guaranty Trust Co.* v. *York,* 326 U. S. 99. *U. S.* v. *Oregon Lumber Co.,* 260 U. S. 290, 299, 301. *Angel* v. *Bullington,* 330 U. S. 183. *Order of Travelers* v. *Wolfe,* 331 U. S. 586.

In the *Oregon Lumber* case the Court said:

> "The defense of the statute of limitations is not a technical defense but substantive and meritorious. The great weight of modern authority is to this effect * * *. The doctrine of election of remedies and that of *res judicata* are not the same, but they have this in common, that each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause." (260 U. S. 290, 299, 301)

In *Angel* v. *Bullington* the Court held that the North Carolina statute refusing jurisdiction to the cause of action pleaded was not merely "procedural" or "remedial" but dealt with substantive rights, saying:

> "The 'merits' of a claim are disposed of when it is refused enforcement." (330 U. S. 183, 190)

In *Roche* v. *McDonald,* 275 U. S. 449, this Court held directly that a judgment, even though erroneous, which ig-

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[11] *District of Columbia,* R. 85. *New York,* R. 64. Neither judgment was changed upon appeal. Section 482 of the New York Civil Practice Act prevents a new action for the same cause when a final judgment dismissing the complaint *expressly* declares that it is rendered upon the merits.

nores and in effect is rendered in violation of the applicable statute of limitations, is *res judicata* with respect to the statute of limitations and in an action upon the judgment in another state, the question of time limitations may not be raised again.

Just as the plaintiff in *Baldwin* v. *Traveling Men's Association,* 283 U. S. 522, had his day in court with respect to jurisdiction (sometimes said not to go to the "merits") and could therefore not re-litigate that question, the plaintiff here has had his day in court with respect to the statute of limitations.

But even if it should be held that the prior judgments were not on the "merits", nevertheless they did adjudicate *questions* and *issues* which are identical to those presented in the instant case—viz., that the cause of action pleaded arose (publication occurred) on or before January 14, 1944, and that a suit brought more than one year after January 14, 1944, was barred by a one-year statute of limitations.

The parties, the causes of action and *the period of* limitations in the various actions are identical. The courts of three jurisdictions adjudicated the precise issues and questions presented to the Court below. The law of these jurisdictions has been laid down in the New York, District of Columbia, and Massachusetts cases between these same parties. All questions and issues material here have been fully litigated and are, between these parties, *res judicata* in Pennsylvania law. *Metzger's Estate,* 242 Pa. 69, 79, 88 A. 915, 918. *Jones* v. *Costlow,* 354 Pa. 245, 253, 47 A. (2d) 259, 263. *Federal Land Bank of Baltimore* v. *Putnam,* 350 Pa. 533, 538, 39 A. (2d) 586, 588. *Wallace's Estate,* 316 Pa. 148, 153, 174 A. 397, 399.

The novel theory of the Circuit Court of Appeals by which plaintiff is enabled to circumvent the statute of limitations of the state of the forum, if the theory has any possible validity, could have been asserted by plaintiff in the prior actions in New York, District of Columbia and Massachusetts. But dismissal of plaintiff's complaint in the prior actions, even if it had been erroneous, is binding upon plaintiff in the instant action regarding the issues of place and time of publication of the alleged libel. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371. *Roche* v. *McDonald,* 275 U. S. 449.

The full faith and credit clause precludes any inquiry into the logic or the legal principles underlying the three prior decisions, which are conclusive as to all the *media concludendi, Milliken* v. *Meyer,* 311 U. S. 457, 462; *Bissell* v. *Spring Valley Township,* 124 U. S. 225, 236, and as to the *nature* of plaintiff's claim. *Morris* v. *Jones,* 329 U. S. 545, 552. It follows that it may not be disputed in this action that plaintiff has asserted no more than one cause of action, that that cause of action arose in Illinois on or before January 14, 1944, and that after the expiration of one year from January 14, 1944, the cause is barred by a one-year statute of limitation.

The full faith and credit clause and the doctrine of *res judicata* bar re-litigating in the federal courts the identical issues adjudicated in the prior actions. *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 166. *Heiser* v. *Woodruff,* 327 U. S. 726, 731, 733. *Riley* v. *New York Trust Co.,* 315 U. S. 343, 349. *Cooper* v. *Newell,* 173 U. S. 555, 567. The Constitution has made that which has been adjudicated in one state conclusive to the same extent in every other. *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 438, and

cases cited. *Riley* v. *New York Trust Co.*, 315 U. S. 343, 348-9.

The Circuit Court of Appeals therefore erred in refusing faith and credit to the judicial proceedings of New York, District of Columbia and Massachusetts.

Respectfully submitted,

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